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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re LUCY B., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JULIE B. et al.,

Defendants and Appellants.

D052788

(Super. Ct. No. NJ013688)

APPEALS from orders of the Superior Court of San Diego County, Harry M.
Elias, Judge. Affirmed.

This is a case in which "the complicated pattern of human relations" gives rise to more than one legitimate claimant to presumed father status" (*In re J.L.* (2008) 159 Cal.App.4th 1010, 1019.) We are presented with three appeals involving dependent child Lucy B. Lucy's mother, Julie B., and stepfather, Cole B., each appeal orders

denying their petitions for modification under Welfare and Institutions Code section 388¹ by which they sought to vacate a judgment of paternity as to Lucy's presumed father, Edgar G. Julie and Cole also contend the court erred by weighing competing presumptions of paternity favorably to Edgar rather than Cole, and Lucy was denied effective assistance of counsel when her attorney argued to have Edgar declared Lucy's one presumed father. In Edgar's appeal, he contends the court erred by failing to consider placing Lucy with him as a nonoffending, noncustodial parent under section 361.2, and had the court considered doing so, there was no showing placement with him would be detrimental to Lucy. We affirm the orders as to all appellants.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2007 six-year-old Lucy became a dependent of the juvenile court and was removed from Julie's custody based on findings she was at risk of harm due to domestic violence between Julie and Cole. Lucy came to the attention of the San Diego County Health and Human Services Agency (Agency) when Julie stabbed Cole in the arm with a knife after the couple had been drinking and arguing. The court placed Lucy with her maternal grandparents in Texas and ordered Julie to participate in reunification services.

Julie filed a paternity declaration naming Cole as Lucy's father and stating Cole had supported Lucy financially and emotionally for the past five years. Although Lucy referred to Cole as her father, she knew he was not her biological father. Julie said Edgar

¹ Statutory references are to the Welfare and Institutions Code unless otherwise specified.

was Lucy's biological father but had never been a part of Lucy's life. Julie claimed she had no personal information about Edgar's whereabouts.

After Lucy's removal but before the dependency petition was filed, the social worker contacted Cole, who was in the Marine Corps awaiting deployment to Iraq. Cole said he and Julie had been together since Lucy was two years old and he was the only father Lucy recognized. He described the latest incident of domestic violence with Julie, and said he did not intend to be around the family much longer. When the social worker explained there was a possibility the court would find Cole was Lucy's presumed father, giving him the right to participate in the dependency proceedings, Cole said he would keep the information in mind and contact the social worker if he wanted to be represented by counsel. The social worker was left with the impression that Cole was not interested in pursuing reunification with Lucy.

In August 2007 Edgar contacted Agency. He said he had been trying to locate Lucy for the past two years and recently discovered she had become a dependent of the court. Edgar told the social worker he had been present at Lucy's birth and was involved in her life for four years. He lost contact with Lucy due to Julie's frequent moves. Edgar currently lived in Florida and wanted custody of Lucy. The maternal grandparents told the social worker they were sure Edgar was Lucy's biological father.

Edgar was present at a special hearing to determine paternity on September 18, 2007. The court granted Edgar presumed father status under Family Code section 7611, subdivision (d) and ordered Agency to evaluate him for custody. Julie appealed, and in

an unpublished opinion, we affirmed the judgment declaring Edgar to be Lucy's presumed father. (*In re Lucy B.* (May 14, 2008, D051974) [nonpub. opn.])

In November 2007 Julie filed a section 388 modification petition, seeking to have the court rescind Edgar's presumed father status. She alleged Edgar had never taken an active part in Lucy's life, Lucy had known only Cole as her father, and Cole should be declared Lucy's presumed father. Around the same time, Cole, who was in Iraq, telephoned the social worker to request reunification services. He said it was unfair that Edgar was granted presumed father status after not being a big part of Lucy's life. The social worker recommended the court address paternity for Cole. The court appointed counsel for Cole and set the matter for trial.

The social worker reported that Edgar and Lucy had been enjoying a positive relationship through regular telephone contact. Lucy was excited to speak to Edgar and looked forward to spending time with him. However, after the court declared Edgar to be Lucy's presumed father, their relationship began to change. Lucy no longer wanted to talk to Edgar and was fearful he would take her away from the grandparents. Edgar regularly expressed his willingness to do whatever was in Lucy's best interests.

In December 2007 Edgar filed a section 388 modification petition, requesting the court return the proceedings to the dispositional phase and place Lucy with him under section 361.2. Edgar alleged reasonable search efforts were not made to locate him before disposition because Julie deliberately concealed information about his identity and whereabouts.

In February 2008 Cole filed a section 388 modification petition, alleging due process violations and requesting the court vacate Edgar's judgment of paternity and grant Cole presumed father status. Alternatively, Cole asked the court to balance competing presumptions of paternity under Family Code section 7612, subdivision (b) and find him to be Lucy's legal father.

The court conducted hearings on the issues of paternity, each party's modification petition and Lucy's six-month review. The court received into evidence photographs of Lucy submitted by Edgar and Cole, and several videotapes of Lucy taken by Edgar's family. The court also received the social worker's report stating Julie was actively participating in services and Cole had returned from Iraq. Edgar's home in Florida had been approved through the Interstate Compact on the Placement of Children (ICPC). Although Edgar was appropriate with Lucy during telephone conversations, Lucy often did not want to speak to him. However, Lucy's therapist reported Lucy was becoming less reluctant to speak to Edgar. The social worker noted Edgar had made every effort to reestablish a relationship with Lucy and was committed to her. Thus, the social worker recommended the court allow a 29-day visit if it did not place Lucy with Edgar.

Lucy testified Cole was her father and she did not know who Edgar was. She recently spoke to Edgar on the telephone, but did not like doing so. She did not want the telephone calls to continue and did not want to visit Edgar. Lucy said Edgar had been mean to her, like the time he made her call him "daddy." If given a choice, Lucy wanted to live with her grandparents.

Julie testified she was not sure Edgar was Lucy's biological father. Julie lived with Edgar periodically in 1999 and for six weeks in 2000 when she was pregnant with Lucy. Edgar attended a few prenatal appointments, was present when Lucy was born, but did not put his name on the birth certificate. Edgar never lived with Lucy. Although he telephoned Lucy and had a few visits with her, he did not have overnight visits or financially support her. Lucy always referred to Cole as her daddy. Julie testified Cole and Lucy had a strong bond and Cole supported Lucy emotionally and financially.

The maternal grandparents testified Edgar was present at Lucy's birth, took Lucy home from the hospital, and referred to her as his daughter. Edgar visited Lucy, but never lived with her, had overnight visits or financially supported her. From 2001 to 2003 Lucy lived mostly with the grandparents. On one occasion, they took Lucy to visit Edgar. Cole helped care for Lucy when she was a baby and eventually took on the role of father. The grandparents further testified Lucy is upset by Edgar's telephone calls, and she heard him say he was going to get custody of her. When shown a photograph of Lucy with Edgar taken in 2007, the grandmother acknowledged Lucy did not seem afraid, upset or uncomfortable.

Edgar testified he lived with Julie at the time she became pregnant with Lucy, and the pregnancy was planned. He attended all prenatal appointments and paid the "co-pay" portion of the medical bills. Edgar lived with Lucy from the time she was released from the hospital after her birth until she was two months old. After Edgar and Julie separated, he visited Lucy every few months and had four overnight visits. Although there was no

formal support order, Edgar sometimes gave Julie cash for Lucy's support. He was positive that he was Lucy's father. He held Lucy out to family and others as his daughter.

Edgar testified about the contact he had with Lucy until she was five years old, including her birthdays and holidays. Some visits were weekends or overnights. Edgar brought Lucy gifts, and he sometimes fed and dressed her. In 2005 Edgar lost contact with Julie. He did not see Lucy or communicate with her from October 2005 until August 2007, when he learned of the dependency proceedings.

Edgar regretted not having consulted an attorney or filed documents in court to try to establish paternity, and admitted he "should have done more." He was committed to maintaining a relationship with Lucy, willing to assume financial responsibility for her and able to provide her with a home.

Cole testified he had been part of Lucy's life since she was born. He began living with Julie and Lucy in 2003, and continued to be Lucy's caregiver, which included feeding and bathing her, and taking her to the park and to medical appointments. Lucy referred to Cole as "daddy" and he introduced himself as Lucy's dad. Cole married Julie in December 2005.

Soon after Lucy was removed from Julie's custody, Cole filed for divorce and did not list Lucy as a child of the marriage. Cole told the social worker he would not be present for the dependency proceedings because he was preparing for deployment to Iraq. The social worker informed him about the possibility of obtaining presumed father status, and Cole admittedly said he did not plan to be around the family any longer because he had gone as far as he could with Julie. Although Cole was on leave for a month before

deploying, he did not contact the social worker or the juvenile court about wanting to participate in the proceedings. He did, however, visit Lucy at the grandparents' home in Texas.

Cole further testified that after returning from deployment, he and Julie began living together again. Cole decided not to pursue the divorce because Julie was addressing her alcoholism, but if she resumed drinking, he would divorce her. Cole contacted the social worker and his attorney, who had been appointed for him while he was in Iraq, and submitted a paternity questionnaire. Since his return, Cole telephoned Lucy every night.

Social worker Robert Dietze testified about his conversation with Cole on May 1, 2007, regarding the dependency petition Agency intended to file and the opportunity for Cole to have counsel appointed and participate in the dependency proceedings as Lucy's presumed father. When Cole expressed his uncertainty about becoming involved, Dietze gave him his telephone number and instructed him to call as soon as he made a decision. Dietze did not hear from Cole and unsuccessfully tried to contact him.

After considering the evidence and hearing argument of counsel, the court ruled first on the section 388 petitions filed by Cole and Julie. The court found that although Cole had not received a Judicial Council Form JV-505 informing him of his potential paternity rights, he had actual notice and any error was harmless. The court found both Edgar and Cole qualified as presumed fathers under Family Code section 7611, subdivision (d). After balancing the presumptions, the court declared Edgar to be Lucy's one presumed father.

The court denied Edgar's section 388 petition seeking to have the proceedings returned to the dispositional phase and Lucy placed with him. Nevertheless, it ordered 12 months of reunification services for Edgar. The court continued Lucy as a dependent and continued her placement with the grandparents.

DISCUSSION

I

Cole contends the court erred by denying his section 388 modification petition seeking to vacate Edgar's judgment of paternity. He asserts he was denied notice and an opportunity to change his paternity status, resulting in prejudice to him because the paternity contest "was not tried on a level playing field."

A

A section 388 modification petition is a proper vehicle by which to raise a due process challenge to lack of notice. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.) Due process requires notice that is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of an action and afford them an opportunity to object. (*Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314; *In re Justice P.*, *supra*, 123 Cal.App.4th at p. 188.) Due process is a flexible concept that depends on the circumstances of the case and a balancing of various factors. (*In re Earl L.* (2004) 121 Cal.App.4th 1050, 1053.)

B

Here, the court found notice and a copy of the petition were sent to Cole at his Oceanside address. Cole claims Agency should have mailed the notice, including

Judicial Council Form JV-505, and a copy of the dependency petition to him at the Marine Corps Base Twentynine Palms, where he was "in the field" for pre-deployment training. However, nothing in the record indicates Agency had a mailing address for Cole at Twentynine Palms or that Cole's mail, after being sent to his last known address in Oceanside, was not forwarded to him there.

In any event, the evidence showed that before the detention hearing, social worker Dietze informed Cole of the dependency petition that would be filed and his right to participate in the proceedings as Lucy's presumed father. Cole said he would not be available to participate in the proceedings and expressed his ambivalence about continuing his relationship with Julie. Cole said he would contact Dietze should he want legal representation in the dependency matter. Despite having actual notice of his rights, Cole did not request counsel or seek to establish his paternity before being deployed. Once a parent has been located and made aware of dependency proceedings, "it becomes the obligation of the parent to communicate with [Agency] and participate in the reunification process." (*In re Raymond R.* (1994) 26 Cal.App.4th 436, 441.)

As the juvenile court found, and Agency concedes, there is no indication Cole was provided with Judicial Council Form JV-505 (entitled Statement Regarding Parentage), which informs an alleged father he can compel the court to determine his paternity, request appointment of counsel, state his belief he is the father of the child, and ask the court to enter a judgment of paternity. (§ 291; *In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1121.) Although this resulted in a statutory notice violation, Cole's constitutional due process rights were not implicated because he had actual notice and the opportunity

to participate in the proceedings and change his paternity status if and when he chose to do so. (See *In re Eric E.* (2006) 137 Cal.App.4th 252, 258.) This is not a case where an alleged father was unaware he potentially had parental rights. (Cf. *In re Paul H.* (2003) 111 Cal.App.4th 753, 762.) Where, as here, a statutory mandate is not followed, we apply a harmless error analysis. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 624.) Under these circumstances, we cannot say Cole would have obtained a more favorable result had Judicial Council Form JV-505 been sent to him or had notice been mailed to him at a different address. (*In re Kobe A., supra*, 146 Cal.App.4th at p. 1123; *In re Angela C.* (2002) 99 Cal.App.4th 389, 393-394.) Although the court denied Cole's section 388 petition by which he sought to vacate the finding of paternity as to Edgar, it conducted a full hearing at which Cole was able to litigate his presumed father status. Indeed, the court found he was a presumed father. Thus, despite the court's unfavorable ruling on Cole's due process claim, the playing field was level and Cole was not prejudiced in his ability to obtain presumed father status. Because no constitutional due process violation occurred and any statutory notice violation was not prejudicial, the court properly denied Cole's section 388 modification petition.

II

Julie contends the court erred by denying her section 388 petition for modification seeking to rescind Edgar's presumed father status. She asserts new evidence showed Edgar did not qualify as Lucy's presumed father under Family Code section 7611, subdivision (d) because he never showed a full commitment to his parental responsibilities—emotional, financial or otherwise—and he had no relationship with

Lucy. Julie further asserts even if Edgar initially qualified as a presumed father, he lost that right during the two years he was absent from Lucy's life and should be disqualified as Lucy's presumed father for bad conduct.

A

Preliminarily, Agency asserts principles of finality and res judicata precluded Julie and Cole from utilizing section 388 to challenge the juvenile court's judgment of September 18, 2007, declaring Edgar to be Lucy's presumed father. However, regardless of the vehicle by which Julie and Cole sought to have Cole declared Lucy's presumed father, the juvenile court undertook this task in the context of a 9-day trial at which all parties fully and fairly litigated their legal rights. Under these circumstances, we decline Agency's invitation to address whether parentage decisions in dependency proceedings are subject to the doctrine of res judicata. In the interests of judicial economy, we review the court's finding that Edgar qualified as a presumed father under Family Code section 7611, subdivision (d).

B

We will affirm a finding of presumed father status if it is supported by substantial evidence. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1650; *In re A.A.* (2003) 114 Cal.App.4th 771, 782.) In reviewing the record for substantial evidence, we do not pass on the credibility of witnesses or reweigh the evidence. Rather, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order and affirm the order even if other evidence supports a contrary finding. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53; *In re Spencer W.*, *supra*, 48 Cal.App.4th at

p. 1650) The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

C

The extent to which a father may participate in dependency proceedings, and a father's rights in those proceedings, depend on his parentage status. (*In re T.R.* (2005) 132 Cal.App.4th 1202, 1209.) Only presumed fathers are entitled to all the rights afforded to parents, including the appointment of counsel, reunification services and custody (absent a finding of detriment). (§§ 317, subd. (b), 361.2, subd. (a), 361.5, subd. (a); *In re Zacharia D.* (1993) 6 Cal.4th 435, 448; *In re T.R.*, *supra*, 132 Cal.App.4th at p. 1209.) A presumed father is defined exclusively under the provisions of the Uniform Parentage Act of 1973 (UPA) (Fam. Code, § 7600 et seq.). Family Code section 7611 provides several ways by which a man may achieve presumed father status, including when he "receives the child into his home and openly holds out the child as his natural child." (Fam. Code, § 7611, subd. (d).)

"Although more than one individual may fulfill the statutory criteria that give rise to a presumption of paternity, 'there can be only one presumed father.' " (*In re Jesusa V.*, *supra*, 32 Cal.4th at p. 603.) The procedure for reconciling competing presumptions is set forth in Family Code section 7612: "(a) Except as provided in . . . Chapter 3 (commencing with [Family Code] [s]ection 7570) . . . a presumption under [Family Code] [s]ection 7611 is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. [¶] (b) If two or more presumptions arise under [Family Code] [s]ection 7611 which conflict with each

other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls." (See also *In re Kiana A.* (2001) 93 Cal.App.4th 1109, 1115.)

D

Here, the evidence showed Edgar and Julie lived together periodically, both before and after Lucy was born. Edgar attended prenatal appointments, was present at Lucy's birth, agreed to be named as Lucy's father on her birth certificate, and told his family and friends he was her father. Photographs and videotapes showed that Edgar publicly acknowledged Lucy as his daughter and was involved in her life. He provided some financial support for Lucy, and at some point, she referred to him as "daddy." After Edgar and Julie ended their relationship, Edgar tried to remain in Lucy's life, sometimes having weekend, overnight or monthly visits and other times seeing Lucy only sporadically. Notwithstanding the conflicting evidence presented at trial, the court could reasonably find Edgar received Lucy into his home and openly held her out as his natural child. Substantial evidence supports a finding Edgar qualified as a presumed father within the meaning of Family Code section 7611, subdivision (d).

E

Julie argues Edgar abandoned Lucy, and Edgar's bad conduct should legally disqualify him from achieving presumed father status. However, Julie has forfeited this argument by not raising it in the juvenile court. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293.) In any event, the court was aware that Edgar had no contact with Lucy for two years but it also considered that immediately after learning Lucy had been taken into protective custody, Edgar traveled to San Diego from Florida to assert paternity and

participate in her dependency proceedings. He actively sought to reestablish a relationship with Lucy, asked to be evaluated for placement and requested visitation and telephone contact. Edgar was sensitive to Lucy's emotional needs and wanted only what was best for her. Thus, the court could reasonably find Edgar's absence from Lucy's life was outweighed by other considerations supporting his status as a presumed father.

III

Having found both Edgar and Cole qualified as presumed fathers, the juvenile court properly proceeded to weigh the competing presumptions under Family Code section 7612, subdivision (b). Julie and Cole contend the court erred by balancing the competing presumptions of paternity in favor of Edgar. They assert the "weightier considerations of policy and logic" dictate that Cole should be Lucy's one presumed father. (Fam. Code, § 7612, subd. (b).)

A

When weighing considerations of policy and logic to resolve conflicting presumptions of paternity, "the trial court must evaluate a number of factors and in the end protect the well-being of the child." (*Craig L. v. Sandy S.* (2004) 125 Cal.App.4th 36, 43.) "[U]nder [Family Code] section 7612, subdivision (b), no single factor—whether social or biological—controls resolution of the conflict between competing presumed fathers." (*Id.* at p. 52.)

We review the court's finding on this issue for abuse of discretion. (*In re Jesusa V.*, *supra*, 32 Cal.4th at p. 607; see also *Gabriel P. v. Suedi D.* (2006) 141 Cal.App.4th 850, 864.) In this regard, the juvenile court's order will not be disturbed on appeal unless

the court has exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. When two or more inferences reasonably can be deduced from the facts, we have no authority to reweigh the evidence or substitute our judgment for that of the trial court. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319; *In re Tanis H.* (1997) 59 Cal.App.4th 1218, 1226-1227.)

B

Here, the court performed its fact-finding duty with respect to each presumption and determined which presumption was entitled to greater weight. In doing so, the court was "guided by the principle that the goal of our paternity statutes is 'the protection of the child's well-being.' [Citation.]" (*Craig L. v. Sandy S.*, *supra*, 125 Cal.App.4th at p. 52.) The evidence showed Edgar was likely Lucy's biological father. Biology, although not determinative, is a relevant and important factor that the court was entitled to consider. (*In re Jesusa V.*, *supra*, 32 Cal.4th at p. 608; *Craig L. v. Sandy S.*, *supra*, 125 Cal.App.4th at p. 49.) The court recognized that as a biological father, Edgar had an established relationship with Lucy and made a meaningful effort to maintain that relationship. Although Lucy currently views Cole as her "daddy," she knows that Edgar is her father and that he plays a role in her life. She has recently become receptive to the possibility of having more contact with Edgar.

The court also considered that Edgar, despite having been absent from Lucy's life for long periods, came forward immediately when Lucy was removed from Julie's custody to assert paternity, reestablish a relationship with Lucy and provide her with a stable home. Edgar is committed to Lucy and has stepped forward to parent her and

provide her with stability. His motive is independent of his relationship with Julie. In contrast, Cole was ambivalent about getting involved in the dependency proceedings and pursuing reunification with Lucy, and he waited until a day or two before his deployment to contact the social worker. He waived in his commitment to this family and that commitment remains questionable, given Cole's stated intention to divorce Julie if she relapses. From this evidence, the court could reasonably infer Cole's plan is not to parent Lucy, but only to visit her. The court reasoned that in the event Cole and Julie do not stay married, Lucy would be best protected by having the ability to continue her relationship with Edgar. Applying policy and logic, the court found Lucy's best interests are served by declaring Edgar to be her presumed father while allowing Lucy to maintain her relationship with Cole as her stepfather. As Lucy's counsel aptly noted, this would keep everyone who loves Lucy in Lucy's life.

Further, the social policies to uphold the integrity of the family do not come into play here. Lucy was five years old at the time Julie and Cole were married. Lucy, Julie and Cole lived together as a family for less than a year, and the relationship between Cole and Julie was fraught with conflict, resulting in Lucy's removal due to domestic violence. The court properly considered that Edgar's continued involvement in Lucy's life as her legal father would have no impact on Julie and Cole's marriage. (See *Craig L. v. Sandy S.*, *supra*, 125 Cal.App.4th at p. 51.)

The juvenile court carefully weighed "all relevant factors—including biology—in determining which presumption was founded on weightier considerations of policy and logic." (*In re Jesusa V.*, *supra*, 32 Cal.4th at p. 608.) In the end, the court gave the

greatest weight to Lucy's well-being. We cannot say the court abused its discretion by applying the competing presumptions of paternity in favor of Edgar.

IV

Cole contends Lucy was denied effective assistance of counsel because her trial counsel argued a position contrary to Lucy's stated wishes, which were neither inimical to her well-being or contrary to the goals of juvenile dependency law. Cole further contends trial counsel's position—that Edgar, rather than Cole, should be Lucy's one presumed father—was detrimental to Lucy's best interests because Lucy wanted to remain with her grandparents. Agency responds, and we agree, that Cole does not have standing to raise this claim.

An appellant cannot urge errors that affect only another party who does not appeal. (*In re Vanessa Z.* (1994) 23 Cal.App.4th 258, 261.) Similarly, a party is precluded from raising issues on appeal that do not affect his or her own rights. (*In re Jasmine J.* (1996) 46 Cal.App.4th 1802, 1807 [father lacked standing to appeal termination of parental rights on ground he was denied hearing on placement of child with sibling because father's rights are not affected by this placement].) Here, Cole cannot assert Lucy's statutory right to be represented by competent counsel because that right is personal to Lucy. (*In re Caitlin B.* (2000) 78 Cal.App.4th 1190, 1194.) Moreover, Cole, who is not Lucy's legal parent, has no standing to raise an issue related to Lucy's best interests in remaining with her grandparents. (*In re Frank L.* (2000) 81 Cal.App.4th 700, 703.)

Most importantly, it makes no sense to confer standing on a party, whose interests may be adversarial to those of a minor, when the minor has independent counsel on

appeal. This court, consistent with statutes and Rules of Court, regularly appoints independent counsel for minors on appeal. Lucy's appellate counsel, after reviewing the matter thoroughly and speaking to Lucy, her grandparents, trial counsel, the social worker and Lucy's therapist, has not raised the issue of ineffective assistance of trial counsel, and agrees the court's orders should be affirmed. Cole is in no better position to protect and assert Lucy's interests.

V

Edgar contends the court erred by placing Lucy with the grandparents without first considering placing her with him as a nonoffending, noncustodial parent under section 361.2. He asserts the court was required to place Lucy with him unless it expressly found this placement would be detrimental to Lucy's well-being. Edgar challenges the sufficiency of the evidence to support a finding of detriment.

A

Under section 361.2, subdivision (a), the court must place a dependent child with a noncustodial, nonoffending parent who requests custody, unless the placement would be detrimental to the child's safety, protection, or physical or emotional well-being. The juvenile court must make its finding of detriment by clear and convincing evidence. (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426.) We review the court's finding on the question of detriment in the light most favorable to the order to determine whether substantial evidence supports it. (*Ibid.*; *In re Shelley J.* (1998) 68 Cal.App.4th 322, 329-330.)

B

Here, the court was well aware that Edgar wanted Lucy placed with him. However, Edgar did not argue he was entitled to custody of Lucy under section 361.2, subdivision (a), and indeed, he was not seeking immediate custody of Lucy. Edgar's counsel assured the court that although Edgar wanted to parent Lucy, he respected Lucy's emotional needs and her significant relationship with the grandparents: "[I]t is not our plan to drag Lucy kicking and screaming out of the grandparents' home. We would do it on a transitional basis. We would do it with therapeutic input working in conjoint [therapy]. [¶] We do not want to do anything to damage Lucy's emotional health." By not seeking custody of Lucy under section 361.2, subdivision (a) and not objecting when the court did not make an express reference to that statutory provision, Edgar has forfeited this issue on appeal. (*In re S.B.*, *supra*, 32 Cal.4th at p. 1293.)

In any event, substantial evidence supports an implied finding it would be detrimental to Lucy's emotional well-being to place her with Edgar. Although Edgar had an approved ICPC home study and was able to provide Lucy with adequate care and supervision, a finding of detriment for purposes of deciding placement with a nonoffending, noncustodial parent need not be related to parental conduct. (*In re Luke M.*, *supra*, 107 Cal.App.4th at p. 1425.) Because "detriment" has no clear-cut meaning, courts making placement decisions must have flexibility based on facts unique to each child and parent. (See *Guardianship of Zachary H.* (1999) 73 Cal.App.4th 51, 66.) In evaluating detriment, the court is entitled to consider the emotional impact its placement decision has on the minor. (*In re Luke M.*, *supra*, 107 Cal.App.4th at pp. 1425-1426.)

Given their lack of contact for the past two years, Lucy was understandably confused and uncomfortable around Edgar. Lucy testified she did not know Edgar, did not like talking to him on the telephone and did not want to visit him. According to Lucy's therapist, Lucy has no attachment to Edgar. She was fearful that the court would remove her from her grandparents' home, where she had lived for a significant portion of her life. Although Lucy's placement preference to remain with the grandparents was not determinative, it was relevant to the court's exercise of its duty to protect Lucy once dependency was declared. From this record, we infer a finding, by clear and convincing evidence, that placing Lucy with Edgar would be detrimental to her.

DISPOSITION

The orders are affirmed.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.